

employee benefits lawflash

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DOL Extends Participant Disclosure Deadline for 2013

Guidance provides temporary relief from the August deadline for annual disclosures by participant-directed plans.

On July 22, the U.S. Department of Labor (DOL) issued Field Assistance Bulletin 2013-02 (the Bulletin),¹ which provides temporary relief for many plans facing the August 2013 deadline to deliver annual disclosures to participants in participant-directed individual account plans.² Under the Bulletin, plans will now have the opportunity to delay the distribution of the disclosures and include them with other recurring notices and disclosures that typically are distributed later in the year.

Overview of the Guidance

As a matter of background, the requirement for plans to distribute the annual disclosures first applied in 2012. More specifically, regulations and other guidance provided that the notices had to be distributed no later than August 30, 2012 (for plans on a calendar year or a fiscal year beginning between November 1, 2011 and July 1, 2012) and then “at least annually” thereafter.

In the Bulletin, DOL gave its interpretation of the “at least annually” language under the regulation, which is defined as meaning at least once in any 12-month period. DOL presented the following example of how it understands this language: If a plan furnished its first required comparative chart of plan investment options on August 25, 2012, it must furnish the next comparative chart no later than August 25, 2013.

Next, DOL indicated that some plan administrators and service providers had expressed concerns with the timing requirement because the August deadline, which had been a function of the rule’s effective date, would result in the disclosures being out of step with other ERISA disclosures provided to the same plan participants (e.g., annual notices relating to qualified default investment alternatives that must be distributed 30 days before the beginning of a plan year). While the timing could be synchronized by providing two comparative charts within the same 12-month period, the plan community argued that the cost of doing so could be substantial and might be borne by plan participants.

To address these concerns, DOL has adopted a temporary enforcement policy of treating the “at least annually” requirement as being satisfied under the following circumstances:

1. View the Bulletin at <http://www.dol.gov/ebsa/regs/fab2013-2.html>.

2. These participant disclosures are required pursuant to new rules under DOL Regulation 404a-5. For more information on the disclosures, see our October 26, 2010 LawFlash, “DOL Releases Final Disclosure Regulations for Participant-Directed Individual Account Plans,” available at http://www.morganlewis.com/pubs/EB_LF_FinalDisclosureIndividualAccountPlans_26oct10.pdf; November 11, 2011 LawFlash, “SEC Staff Grants No-Action Relief on Compliance with ERISA Disclosure Rule,” available at http://www.morganlewis.com/pubs/EB_LF_No-ActionReliefCompliancewithDisclosureRule_11nov11.pdf; December 12, 2011 LawFlash, “DOL Clarifies Electronic Fee Disclosure Guidance,” available at http://www.morganlewis.com/pubs/EB_LF_ElectronicFeeDisclosureGuidance_12dec11; May 10, 2012 LawFlash, “Department of Labor Releases Guidance on New Disclosure Rules,” available at http://www.morganlewis.com/pubs/EB_LF_DOLGuidanceNewDisclosureRules_10may12; and August 1, 2012 LawFlash, “DOL Revises Guidance on Open Brokerage Windows,” available at http://www.morganlewis.com/pubs/EB_LF_GuidanceOnOpenBrokerageWindows_1aug12.

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- For the next comparative chart to be furnished in accordance with the regulation—which for a calendar-year plan would be due no later than August 30, 2013, according to DOL’s interpretation—DOL will take no enforcement action based on timeliness if the plan administrator furnishes the chart by February 25, 2014.
- Realizing that some plan administrators have already furnished or are on course to furnish their 2013 comparative chart by August 30, 2013, DOL stated that such plan administrators may furnish the 2014 comparative chart—the next one due under the regulation—no later than 18 months after the 2013 comparative chart. For example, if the 2013 comparative chart is furnished on August 25, 2013, the next chart can be furnished by February 25, 2015.

DOL noted that plan administrators are not relieved of their obligations under the regulation to make timely disclosures of changes to the previously provided information and to update website information. DOL also added that this enforcement policy does not affect the rights or obligations of parties other than DOL.

In conclusion, DOL acknowledged that this temporary relief does not address the concern that the current timing requirement may result in a fixed annual deadline for comparative charts and that it is considering whether to revise the regulation to provide “reasonable flexibility” to plan administrators, such as a 30-day or 45-day window. DOL asked for comments on such an approach.

Implications

Previously, there had been some confusion about the meaning of “at least annually.” The Bulletin is helpful in providing formal clarification as to DOL’s interpretation of this language, while, at the same time, offering some flexibility in meeting the annual deadline for the upcoming disclosures. However, by restricting the nonenforcement relief to DOL action, it leaves open the possibility that plan participants could bring claims for late disclosures.

That being said, it is unclear what the remedy would be for these claims. The regulation is aimed at satisfying a fiduciary duty to make disclosures to plan participants who have the right to direct their plan account investments. However, while the regulation says that meeting the requirements protects a plan administrator from liability, it does not specify any penalty or damages for not meeting the conditions of the regulation. If a participant cannot show any direct harm from “late” disclosures, there may not be any associated liability.

By now, most large recordkeeping firms have already worked with their client plans to prepare updated participant disclosures, with the goal of sending them to plan participants by the end of August in view of DOL’s position (which had become known informally prior to the release of the Bulletin). To avoid further time and expense in updating the disclosures, such plans may decide to proceed with meeting the August deadline, with the option of changing their schedule next year if they so desire under DOL’s 2014 comparative chart relief. By then, depending on the response to DOL’s request for comments, it is possible that DOL will have further considered whether to provide additional flexibility by amending the regulation.

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